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Textualism's Gaze

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TEXTUALISM’S GAZE

Matthew L.M. Fletcher*

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INTRODUCTION

In recent years, perhaps because of the influence of the late Justice Scalia, the Supreme Court appears to place greater emphasis on text than

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ever before. “We’re all textualists now,” Justice Kagan declared in 2015.¹ But it is one thing to say a court will prioritize the text; it is another to choose which text is to be prioritized.

Follow the textualism of constitutional interpretation and one will see judges prioritize the public understanding of the privileged white men in power at the time of the framing of the constitutional text. Follow the textualism of federal statutory interpretation and one will see judges prioritize the text exclusively. If the judges engage with the legislative history of the statute, they will engage with the public understanding of the legislators who enacted the law, again, largely privileged white men. The victory of textualism is not necessarily in the outcomes, but in significantly narrowing the scope of evidence available to interpret the text, in some cases to almost nothing but the bare words of the statute. Women, persons of color, and other marginalized persons and entities are almost never relevant to the textualist’s gaze.

The narrow focus of the textualist’s gaze also warps how Indian law matters are decided. The judiciary rarely considers how the governments and people most affected by the text—Indian tribes and individual Indians—understand the meaning of the text. I will show that the judiciary, whether it intends to or not, considers Indians and tribes as extraneous to the interpretive process.

McGirt v. Oklahoma,² decided on the last day of the 2019 Term (along with *Sharp v. Murphy*,³ a companion case), is instructive of the lure and limitations of textualism. The cases involved the State of Oklahoma’s prosecution of a Muscogee (Creek) Nation citizen for capital murder and a Seminole Nation citizen for sex-based crimes committed on non-Indian lands within the historical reservation boundaries. If the lands remain “Indian country,” then the state would not possess jurisdiction.⁴ A treaty between the tribe and the United States established the reservation. Under long-settled precedents of the Supreme Court, only an Act of Congress can terminate the “Indian country” status of an Indian reserva-

1. Diarmuid F. O’Sannlain, “We Are All Textualists Now”: *The Legacy of Justice Antonin Scalia*, 91 ST. JOHN’S L. REV. 303, 304 (2017) (quoting Justice Kagan’s Antonin Scalia Lecture at Harvard Law School, Nov. 25, 2015).

2. 140 S. Ct. 2452, *rev’g* *McGirt v. State*, No. PC-2018-1057 (Okla. Crim. App. Feb. 29, 2019).

3. 140 S. Ct. 2412, *aff’g* *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017).

4. As a general matter, states do not possess criminal jurisdiction over Indians for crimes arising in Indian country. See *Worcester v. Georgia*, 31 U.S. 515, 561 (1831) (“The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.”).

tion.⁵ Congress never took that action, seemingly preserving the reservation boundaries. But Oklahoma relied heavily on the allotment of the reservation and the weight of history as proof that the reservation should be governed by the state.

The Court was deeply split on which text controlled, the treaty establishing the reservation or the allotment laws. The *Murphy* case reached the Court first, but because Justice Gorsuch had participated in an en banc vote in the matter while serving on the Tenth Circuit, he was recused. The Court heard argument in December 2018, but did not issue an opinion by the end of the Term, apparently split 4–4. Eventually, the Court granted cert in a second case with the same legal questions, *McGirt*, to resolve the issues presented with a full Court.

Justice Gorsuch's participation in the *McGirt* case placed his vote as the presumptive tiebreaker, which is exactly what happened—his vote broke the tie, and he even wrote the majority opinion. Gorsuch's *McGirt* opinion is pure textualism writ large. The primary analysis was simply that the United States and the Creek Nation created a reservation together,⁶ no Act of Congress expressly disestablished the reservation,⁷ and so the reservation boundaries remain extant. In some of the most formidable language ever offered in support of tribal interests, Gorsuch completely rejected “extratextual” evidence that once routinely bolstered the Court's reservation boundaries decisions, the kind of evidence mustered by Chief Justice Roberts' dissent:

In the end, only one message rings true. Even the carefully selected history Oklahoma and the dissent recite is not nearly as tidy as they suggest. It supplies us with little help in discerning the law's meaning and much potential for mischief. If anything, the persistent if unspoken message here seems to be that we should be taken by the “practical advantages” of ignoring the written law. How much easier it would be, after all, to let the State proceed as it has always assumed it might. But just imagine what it would mean to indulge that path. A State exercises jurisdiction over Native Americans with such persistence that the practice seems normal. Indian landowners lose their titles by fraud or otherwise in sufficient volume that no one remembers whose land it once was. All this continues for

5. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984); *Nebraska v. Parker*, 136 S. Ct. 1072, 1078–79 (2016) (quoting *Solem*).

6. *McGirt*, 140 S. Ct. at 2460 (“Start with what should be obvious: Congress established a reservation for the Creeks.”).

7. *Id.* at 2468 (“[T]here simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation.”).

long enough that a reservation that was once beyond doubt becomes questionable, and then even farfetched. Sprinkle in a few predictions here, some contestable commentary there, and the job is done, a reservation is disestablished. None of these moves would be permitted in any other area of statutory interpretation, and there is no reason why they should be permitted here. That would be the rule of the strong, not the rule of law.⁸

As a noted textualist thinker, the fact that it was Gorsuch in this role was critical. In 2019, Justice Gorsuch wrote an opinion in an Indian treaty rights case, *Washington Department of Licensing v. Cougar Den, Inc.*,⁹ that focused heavily on how Indians understood the text, in that case a treaty.¹⁰ One of most important canons of construction of Indian treaties articulated in numerous Supreme Court decisions is that the text of a treaty should be interpreted how the Indian treaty negotiators understood the treaty at the time of negotiation and ratification.¹¹ Gorsuch privileged the Indian (or tribal) understanding of the treaty terms, but was only able to persuade one other judge to join his opinion.¹²

Justice Gorsuch appears to be the rare judge who takes seriously the views of Indian tribes in interpreting Indian law. His absence in the *Murphy* case may have impacted how the parties briefed that case. What is absent from the extensive briefing in the *Murphy* case is how the Muscogee (Creek) Nation, its citizens, and perhaps most importantly, its local governments (known as tribal towns) understood the relevant texts. For example, it seems relevant, even potentially dispositive, that the tribal towns continued governing *as if nothing had changed* during the entire history of the federal government's termination of the tribe's national government. In *McGirt*, Justice Gorsuch at least imagined how Creek Indians might have understood the text, at one point asserting, "Oklahoma re-

8. *Id.* at 2474.

9. 139 S. Ct. 1000 (2019).

10. *Id.* at 1021 (Gorsuch, J., concurring in the judgment) ("Really, this case just tells an old and familiar story. The State of Washington includes millions of acres that the Yakamas ceded to the United States under significant pressure. In return, the government supplied a handful of modest promises. The State is now dissatisfied with the consequences of one of those promises. It is a new day, and now it wants more. But today and to its credit, the Court holds the parties to the terms of their deal. It is the least we can do.").

11. *E.g.*, *United States v. Winans*, 198 U.S. 371, 380-81 (1905) ("And we have said we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right, without regard to technical rules.'").

12. Justice Ginsburg joined him. *Cougar Den*, 139 S. Ct. at 1016.

plies that . . . many of its residents will be surprised to find out they have been living in Indian country this whole time. But we imagine some members of the 1832 Creek Tribe would be just as surprised to find them there.”¹³ The focus instead usually is on how the United States, the State, and non-Indians understood the texts, exemplified by the Chief Justice’s dissent. Textualism’s gaze in prioritizing *only non-Indian viewpoints* warps the analysis.

This Article attempts to address why textualism distorts the Supreme Court’s jurisprudence in Indian law. I start with describing textualism in federal public law. I focus on textualism as described by Justice Scalia, as well as Scalia’s justification for textualism and discussion about the role of the judiciary in interpreting texts. The Court is often subject to challenges to its legitimacy rooted in its role as legal interpreter that textualism is designed to combat.¹⁴

In the next part of the Article, I describe three contested subject areas of Indian law and how the Court’s imperfect method of textualism has impacted the outcomes in those cases. I begin with an area relevant to the *Murphy* case, reservation boundaries cases, which involve a text-heavy analysis and should be prototypical examples of the Court’s mastery of textualism. I then survey tribal powers matters usually characterized as implicit divestiture cases, where the Court finds that an inherent tribal power has been divested—the passive voice there is intentional as the Court usually does not rely upon a text to reach that conclusion. I conclude with an area of law that remains open, federal statutes of general applicability that are silent as to Indian tribes, and whether tribes are bound by them. These latter two categories test the Court’s dedication to textualism.

In the third part, I describe how Indian law is different than other areas of law, with unusual and interesting structural, institutional, and cognitive biases unique to Indian law matters. Parties in Indian law cases often ask the Court to decide cases using arguments for which the Court is institutionally weakest, such as deciding whether public policy is served by the outcome—in other words, the work of the legislature. At times, such as in the pending *Murphy* case, the Court *invites* the parties to participate in what appears to be an explicitly legislative process. The Court’s biases run through federal Indian law and invite the parties to focus on policy points rather than the text. If not acknowledged and addressed,

13. *McGirt*, 140 S. Ct. at 2479.

14. See Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 594 (1995) (noting that textualists would argue “judicial legitimacy depends on the court’s doing the legislature’s bidding rather than the court’s own”).

this situation all but guarantees that the gaze of the interpreter will never fall on Indians and tribes.

Finally, I attempt to formulate a theory of Indian law textualism. As with treaty interpretation, the way Indians and tribes understand texts is crucial to the interpretation of all relevant texts—and should usually be dispositive. Federal Indian affairs statutes are usually more than mere federal statutes; they are negotiated agreements between sovereign entities: the United States and the Indian tribes. To treat a federal Indian affairs statute as merely a creature of Congress is wrong.

In short, the Court should seek outcomes that best reflect the understanding of the relevant texts at the time of their enactment, not as they are understood now. This is a blunt instrument. Improper biases dominating at the time of a text's enactment will be an overt part of the Court's decision-making (many observers argue those old biases already predominate). But that work is the work of a court and, as Justice Scalia suggested in comparing originalism to theories of an evolving constitution, simplifies the Court's duties in Indian law. Parties in Indian law cases will begin to strategize accordingly. The only way the judiciary will take into consideration the understanding of Indians and tribes is if Indians and tribes make their understanding known. As the universe of contestable matters in Indian law cases shrink, the outcomes of disputes will be more predictable and clearer. Finally, though this is a subjective question, I predict Indian law will acquire more legitimacy.

I. TEXTUALISM

If I want to promote a theory of textualism for deciding Indian law cases, I ought to identify broadly what I mean by textualism. As many do, I take Justice Scalia's essay¹⁵ that opens *A Matter of Interpretation: Federal Courts and the Law* as my starting point. Justice Scalia began with a description of the common law system that existed in England and is still often taught in American¹⁶ law schools, but which began to fade as soon as democratic institutions like elected legislatures came into being.¹⁷ Scalia then invoked the Legal Process School articulated and originated by Hart and Sacks and others.¹⁸ Both the judge and the professors agree that the

15. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (Amy Gutman ed., 1997).

16. I use "American" in reference to the United States.

17. Scalia, *supra* note 15, at 9–14.

18. The Legal Practice School is shorthand for commentators who advocate for a separation of powers theory based on the institutional capacity of each branch of government. Diane P. Wood, *Legal Scholarship for Judges*, 124 *YALE L.J.* 2592, 2599 (2015).

judicial process of deciding what the law *ought to be* is illegitimate in a democratic system. Scalia quotes *The Legal Process* for the proposition that American judges are not bound to any particular theory of statutory interpretation (or, perhaps, any theory of judicial decision-making).¹⁹

Scalia's condemnation of judges is legendary. He critiqued judges for being dishonest interpreters of statutes, people that reach conclusions about what the law ought to be while pretending to merely interpret a statute.²⁰ I take from his critique that judges can (1) exploit the lack of controlling guidance on theories of statutory interpretation to dishonestly announce and apply their own theory of statutory obligation, (2) announce and identify those theories as within the institutional capacity of the judiciary as a means to dishonestly interpret the law in a manner that (3) is merely the ideological or emotional preference of judges themselves. His theory of textualism derives from the reasoning I suspect was driven by an unfounded assumption by himself and others going all the way back to the Legal Realists—that most American judges are driven by ideology and are willing to lie about it by hiding their prejudices behind neutral reasoning. Ask any commentator sympathetic to tribal interests and you will get agreement that federal and state judges perform exactly the same sleight-of-hand in Indian law (and more than a few observers will likely point at Scalia as being one of the worst offenders).²¹

Justice Scalia's ultimate theory of textualism was that judges "have no authority to pursue . . . broader [social] purposes or write . . . new laws."²² Apparently because legislative intent could conflict with the text (and possibly because the judicial pursuit of legislative intent was so fraught with the opportunity for illegitimate and dishonest judicial reasoning), Scalia's textualism forbade any inquiry into legislative intent at all.²³ For Scalia, the ultimate goal of the judge is to divine *meaning*, not

19. Scalia, *supra* note 15, at 14 (quoting HENRY M. HART, JR. & ALBERT SACKS, *THE LEGAL PROCESS* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994)).

20. Scalia, *supra* note 15, at 18–23 (discussing Calabresi and citing WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 50 (1994)).

21. David Getches discovered Justice Scalia's internal memorandum to Justice Brennan in 1990 regarding a matter of inherent tribal criminal prosecution powers in which Scalia acknowledged and ratified the view that the Supreme Court has "sought to discern what the current state of affairs ought to be" rather than rely exclusively on the legislature's enactments. Memorandum from Antonin Scalia to William Brennan (Apr. 4, 1990), *available at* <https://turtletalk.blog/2016/02/17/addendum-to-justice-scalias-record/>. Even so, I am not arguing Scalia's dicta here is entirely inconsistent with his brand of textualism, which I argue is about limiting the scope of evidence to the views of a narrow class of people.

22. Scalia, *supra* note 15, at 23.

23. *Id.* at 22–23, 29–32.

intent.²⁴ Unlike any form of judicial activist or “strict constructionist,” a textualist does not interpret a text either liberally or conservatively, but “reasonably, to contain all that it fairly means.”²⁵

I take this statement to be the linchpin for all that makes Scalia textualism a deeply troubling interpretive method. Scalia’s glib response to attacks on textualism is simply to admit that one might disagree on the meaning of a text. His rule is a rule of reason. So long as the meaning is reasonable, it is legitimate. What Scalia does here is as brilliant as it is diabolical. Once multiple reasonable meanings have been uncovered, as they were in the *District of Columbia v. Heller* case in which the Court revived a robust theory of individual gun rights,²⁶ Scalia’s solution is no different than Brennan’s notorious rule of five strategy.²⁷ That strategy (ostensibly hated by those who disagreed with the outcomes) is simply a race to five votes; whichever judicial block gets there first decides the controlling meaning going forward.²⁸ And because the only limiting principle in originalism, at least with constitutional texts, is to privilege the statements of elite white men exclusively, the result doesn’t really matter. The victory is in privileging dead, elite, white men—usually slave owners, Indian killers, and beneficiaries of laws favoring privileged white men—in the resolution of modern constitutional disputes. The same is undeniably true in the interpretation of statutes as well, in that the only views relevant under this theory are those of the privileged elite who serve in Congress.

24. See *id.* at 22–23 (agreeing with quotations of Justice Oliver Wendell Holmes, such as “Only a day or two ago—when counsel talked of the intention of a legislature, I was indiscreet enough to say I don’t care what their intention was. I only want to know what the words mean.”) (internal citation omitted).

25. *Id.* at 23. In the realm of constitutional interpretation, where Justice Scalia argued the same rules of interpretation should apply, he seems to have anticipated the criticism that original meaning is no more discoverable than original intent. Scalia accepted that original meaning judges would disagree at times, but he believed that to pursue intent in addition to or in replacement of the pursuit of meaning is to wallow in two different areas of potential indeterminacy, rather than just one (and was still superior to discerning the meaning of a *changing* constitution). *Id.* at 45–46.

26. 554 U.S. 570, 577 (2008).

27. See Dawn Johnsen, *Justice Brennan: Legacy of a Champion*, 111 MICH. L. REV. 1151, 1159 (2013) (reviewing SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* (2010)).

28. See, e.g., Eric J. Segall, Opinion, *For Supreme Court, It’s Not the Law, It’s the Power of Five*, L.A. TIMES, Jan. 19, 2014, <https://www.latimes.com/opinion/la-xpm-2014-jan-19-la-oe-segall-5-judge-majority-20140119-story.html> (“If it is true, as Justice William Brennan used to tell his law clerks, that the most important thing to know about the court is the number five — that with five votes, anything is possible — then perhaps it is time to seriously reconsider a political system in which five life-tenured, politically unaccountable judges have the final say on so many of our most pressing problems.”).

I cannot and will not follow Scalia down this destructively cynical and nihilistic road.

II. A SHORT HISTORY OF INDIAN LAW TEXTUALISM IN THE SUPREME COURT

Federal statutes and treaties are the bread and butter of federal Indian law. In most cases, the Supreme Court engages with the text and often holds it to be dispositive. However, as I will show in this Part, one difficulty with federal Indian law is that too frequently the Court declines to engage with a relevant text or downplays the significance of the text in favor of a common-law-style analysis. Another difficulty is that relevant texts may conflict, creating multiple interpretations that a Scalian textualist would label reasonable, leaving the judges to vote based on their political views. This section is a survey examining important federal Indian law decisions in which there is a relevant text and what the Court does with that text.

I split this part into three subparts keyed to subject areas of federal Indian law: one area in which there tends to be a clear text to apply and applies it, one in which the Court declines to engage with a text even though one is present, and one in which the text is silent (and involves important matters unresolved by the Supreme Court).

A. *Engagement with the Text: Reservation Boundaries Cases*

Indian reservation boundaries cases typically involve the question of jurisdiction over lands within an Indian reservation that are owned by persons or entities that are not members of the tribe. Most of these cases are criminal law cases²⁹ involving the definition of “Indian country” critical to determining criminal jurisdiction;³⁰ others involve liquor regulation³¹ or whether federally owned lands are Indian country. If the non-member-owned land is within an Indian reservation, then under the statute the land is “Indian country.” If the reservation has been disestablished completely or diminished in relevant part, then the nonmember-owned land is not “Indian country.” The relevant texts usually are the treaty, federal statute, or executive order that created the reservation, and

29. *E.g.*, *Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351 (1962).

30. *See* 18 U.S.C. §§ 1151–1153 (2012) (defining “Indian country” and extending United States jurisdiction over certain criminal offenses committed within it).

31. *Nebraska v. Parker*, 136 S. Ct. 1072 (2016).

any treaty, federal statute, or executive order that modified the reservation boundaries.

The Supreme Court takes seriously the relevant texts in reservation boundaries cases, but the Court often finds these texts to be ambiguous and therefore not dispositive. In *Solem v. Bartlett*,³² the Supreme Court articulated a multi-stage test to determine whether lands within a given reservation remain Indian country. The test begins with the text of the relevant treaties, statutes, and executive orders. Congress in creating (and occasionally modifying) reservations did not use uniform words or phrases, and instead seems to have delighted in relying on the thesaurus in writing its laws. The creation of a reservation usually is unambiguous. The modification of a reservation is almost never unambiguous.

Typically, Congress adopts an allotment plan (or instructs the executive branch to adopt and implement a plan) for a given reservation. Allotment carved up many reservations that were communally owned by an Indian tribe or tribes into small, individual parcels selected by tribal citizens. The remaining land—and there was always land remaining—was called “surplus land.” Congress would then authorize the sale of the surplus land. These surplus land acts contained the relevant text modifying a given reservation. Since there was no uniformity in crafting surplus land acts, and also because the facts on the ground of every reservation differed, the text of these statutes also differs. Ambiguity reigns.³³

The Court acknowledged in *Solem* that the plain text usually would not be dispositive, so it adopted a hierarchy of authorities it would consider next. The Court decided it would look to the circumstances surrounding the implementation of the surplus land act at the time of its enactment, then to the time immediately after the enactment, and then throughout history until the present. Virtually any piece of relevant evidence was fair game, from legislative history to appropriations requests by the Office (later Bureau) of Indian Affairs to the changing demographics of the reservation.

In the reservation boundaries cases that followed, the Court almost immediately departed from the texts and moved toward the back-end *Solem* analyses, most notably the current demographics of the reservation.³⁴

32. 465 U.S. 463, 470 (1984).

33. See Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 486 (2005) (“The Court could continue on its current path, supplementing the plenary power of Congress with a judicial common law power. As I have explained, however, every feature of this approach is subject to great doctrinal doubt and forces the Court to address matters on an unpredictable case-by-case basis that it has the least competency to handle.”).

34. See, e.g., *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998); *Hagen v. Utah*, 510 U.S. 399, 416 (1994). Justice Scalia joined both majorities.

Other than the “fairly clean” analytical structure, nothing was certain or predictable in how these cases would be decided. As should be obvious by now, the outcomes of reservation boundaries disputes are unpredictable, if not completely random.

The last Supreme Court reservation boundaries case decided, *Nebraska v. Parker*,³⁵ seemed to put an end to much of that nonsense. The Court unanimously concluded that Congress did not intend to diminish the Omaha Indian Reservation.³⁶ There, the Court relied almost exclusively on the text. The Court disregarded the back-end *Solem* factors that did not support the tribe’s position, notably that the tribe had exercised comparatively little authority on portions of the reservation.³⁷ The tribe had asked the United States on multiple occasions to sell the portion of the reservation at issue (that the government was not successful for the most part perhaps affected the optics of the case but was not a critical part of the analysis).³⁸ The tribal government had not asserted governance power (here, liquor regulation) over the relevant area, ever. The Court left for another day the question about the length of time since the tribe had last asserted governmental power over the area.³⁹ The text prevailed. The remaining *Solem* factors played little or no role.

McGirt v. Oklahoma may become the most important Indian law decision in decades if Justice Gorsuch’s fidelity to textualism continues to prevail in future cases. There, the relevant texts included the treaty establishing the Muscogee (Creek) Nation’s reservation.⁴⁰ The Creeks granted some lands to the Seminole Nation of Oklahoma⁴¹ and ceded lands to the United States after the Civil War⁴² but those cessions were not relevant. There was, however, an 1898 statute that seemed very much like a termination statute, a law disestablishing the *tribal courts*,⁴³ but one that did not mention the fate of the reservation. In 1906, Congress explicitly reaffirmed the existence of the tribe.⁴⁴ In 1907, Congress admitted Oklahoma into the Union.⁴⁵

35. 136 S. Ct. 1072 (2016).

36. *Id.* at 1076.

37. *See id.* at 1082 (“[W]e express no view about whether equitable considerations of laches and acquiescence may curtail the Tribe’s power to tax the retailers of Pender in light of the Tribe’s century-long absence from the disputed lands.”) (citation omitted).

38. *Id.* at 1081.

39. *Id.* at 1082.

40. Treaty with the Creeks of Jan. 24, 1826, art. 2, 7 Stat. 286.

41. Treaty with the Creek and Seminole Tribes of Aug. 7, 1856, art. 4, 11 Stat. 699, 700.

42. Treaty with the Creeks of June 14, 1866, arts. 3, 9, 14 Stat. 785, 786, 788.

43. Curtis Act, ch. 517, 30 Stat. 495 (1898).

44. Five Tribes Act, 34 Stat. 137 (1906).

45. Oklahoma Enabling Act, 34 Stat. 267 (1906).

There was an allotment agreement of 1901 (with modifications in 1902) that changed the land ownership patterns of the reservation but did not alter the reservation boundaries.⁴⁶ Much of the reservation land is now owned by nonmembers. But the Tenth Circuit held that allotment alone could not have terminated the reservation.⁴⁷

In the *Murphy* case, with Justice Gorsuch recused, Oklahoma attempted to establish the *Solem* back-end factors, and not the text, as the battleground before the Court. Oral argument was all about consequences to reaffirming the reservation boundaries.⁴⁸ After oral argument the Court asked the parties to brief questions that impliedly repudiated the *Solem* factors.⁴⁹ Even so, the parties' supplemental briefs are rife with argument and facts related to the policy outcomes if the tribal interests prevailed.

There was a text establishing the reservation. There were texts amending the reservation boundaries, but not involving lands at issue in *Murphy* or *McGirt*. There were texts related to the allotment of the reservation, but "Indian country" includes allotted lands. There was no surplus land act to diminish the reservation. If the Court focused on the texts alone, these would be easy cases, not unlike *Parker*. But instead the State seemed to be driving the Court in the direction of the policy implications, not the text. Ultimately, the State garnered four votes, not enough to prevail here, but enough to wonder about the fidelity of the Court to textualism overall.

46. Original Allotment Agreement of Mar. 1, 1901, 31 Stat. 861; Supplemental Allotment Agreement of June 30, 1902, 32 Stat. 500.

47. *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017).

48. *E.g.*, Transcript of Oral Argument at 75, *Carpenter v. Murphy*, 139 S. Ct. 626 (2018) (No. 17-1107) ("Here are the two earth-shattering consequences that Congress can't fix, Sherrill can't fix, and this will stimulate you.") (Lisa Blatt for Oklahoma); *id.* at 63 ("If I may, I would like to address three things: First this issue of consequences . . .") (Riyaz Kanji for the Muscogee (Creek) Nation).

49. *Carpenter v. Murphy*, 139 S. Ct. 626 (2018). The order read:

The parties, the Solicitor General, and the Muscogee (Creek) Nation are directed to file supplemental briefs addressing the following two questions: (1) Whether any statute grants the state of Oklahoma jurisdiction over the prosecution of crimes committed by Indians in the area within the 1866 territorial boundaries of the Creek Nation, irrespective of the area's reservation status. (2) Whether there are circumstances in which land qualifies as an Indian reservation but nonetheless does not meet the definition of Indian country as set forth in 18 U.S.C. § 1151(a).

B. *Declining to Engage with the Text: Tribal Powers Cases*

Since 1978, the Supreme Court has been preoccupied with tribal powers over nonmembers.⁵⁰ In these cases, Congress has enacted statutes that are relevant to the discussion, but the Court has not engaged with them consistently. These cases involve the scope of tribal powers—powers that can only be divested by an Act of Congress or by an Indian tribe by agreement. Typically, but not always, when the Court holds a tribal power is divested, it is unable (or unwilling) to base its holding on federal statutes that tend to support the holding. Most scholars, assuming or asserting that the Court cannot identify a relevant text, refer to the Court's actions as implicit divestiture.⁵¹ At times, the Court has done so as well.

In general, the Supreme Court's precedents hold that tribal powers remain extant unless valid divestiture by Congress or the tribe itself occurs.⁵² The Court usually requires a clear expression of the intent to divest a tribe of powers, either by Congress or the tribe.⁵³ In the first tribal powers case that arguably resulted in an implied divestiture, *Oliphant v. Suquamish Indian Tribe*,⁵⁴ the Court engaged with dozens of texts to reach the conclusion that Indian tribes do not possess the power to prosecute non-Indians. None of these texts were controlling Acts of Congress. Ultimately, the Court concluded that while none of the texts were dispositive, the texts collectively evidenced an assumption by all branches of the federal government, and Indians tribes, too, that tribes never possessed the power to prosecute non-Indians. The loose reasoning of the *Oliphant* Court stands in stark contrast to the Ninth Circuit's decision below in which that court applied the normal federal Indian law framework,⁵⁵ as

50. *E.g.*, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (tribal adjudicatory jurisdiction); *Duro v. Reina*, 495 U.S. 676 (1990) (criminal jurisdiction over nonmember Indians); *Montana v. United States*, 450 U.S. 544, 565–66 (1981) (civil regulatory jurisdiction).

51. *E.g.*, Alex Tallchief Skibine, *Constitutionalism, Federal Common Law, and the Inherent Powers of Indian Tribes*, 39 AM. INDIAN L. REV. 77, 83–99 (2014).

52. *E.g.*, *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

53. *E.g.*, *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883) (“To give to the clauses in the treaty of 1868 and the agreement of 1877 effect so as to uphold the jurisdiction exercised in this case would be to reverse in this instance the general policy of the government toward the Indians, as declared in many statutes and treaties and recognized in many decisions of this Court from the beginning to the present time. To justify such a departure in such a case requires a clear expression of the intention of Congress, and that we have not been able to find.”).

54. 435 U.S. 191 (1978).

55. *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976).

well as a Supreme Court decision issued mere days after *Oliphant* that explicitly applied that rule.⁵⁶

Ironically, a few years later in a tribal civil jurisdiction case captioned *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*,⁵⁷ the Court restated the *Oliphant* reasoning to hold that it was the Trade and Intercourse Act of 1790 that stripped Indian tribes of jurisdiction to prosecute non-Indians.⁵⁸ In that Act, Congress provided that American citizens who entered into Indian country without federal permission had committed a crime, and Congress required that tribes turn offenders over to the United States for punishment.⁵⁹ The Act does not explicitly divest tribes of powers over non-Indians, but perhaps one could read an *implied divestiture* into that text.

Additionally, in the early decades of federal-tribal treaty making, tribes and the United States frequently negotiated tribal criminal jurisdiction over non-Indians.⁶⁰ Though the conclusion is fraught with a potential logical fallacy (negative inferences, the same as with the 1790 Act), it is again conceivable that the United States negotiated with tribes in those early years with an understanding that the Act created a baseline rule that tribes did not possess that power.

The next case involving an implied divestiture of tribal powers, *Montana v. United States*,⁶¹ drew from the holding—if not the reasoning—of the *Oliphant* case. In *Montana*, the Court adopted a general rule analogous to *Oliphant* that tribes do not possess civil regulatory jurisdiction over non-Indians. The Court did not adopt a bright-line rule as it did in *Oliphant* (likely because there were several precedents affirming tribal civil regulatory and taxing powers over nonmembers), nor did the Court explicitly rely upon a text—other than *Oliphant* itself—that could be read as divesting tribes of powers.

As in the *Oliphant* example, there is a plausible text that supported the divestiture announced in *Montana*—the Crow Allotment Act. The Court had previously held in a tax case called *Goudy v. Meath*⁶² that when restricted Indian lands are alienated to nonmembers, the tax immunity tied to the restriction on alienation is lifted. The Crow Allotment Act initiated a process by which restricted Indian lands could be alienated to

56. *Wheeler*, 435 U.S. at 323.

57. 471 U.S. 845 (1985).

58. *Id.* at 853-54.

59. Act of July 22, 1790, 1 Stat. 137.

60. Matthew L.M. Fletcher, *Tribal Civil, Criminal, and Regulatory Jurisdiction over Nonmembers* 2 nn. 7-10, in ROCKY MOUNTAIN MINERAL LAW FOUND., INDIAN LAW AND NATURAL RESOURCES: THE BASICS AND BEYOND (2017) (collecting treaties).

61. 450 U.S. 544 (1981).

62. 203 U.S. 146 (1906).

nonmembers.⁶³ The allotment act, then, could be read (by analogy) as an implied divestiture of tribal powers over the nonmembers on those lands.

Several other cases applying the *Montana* framework (in other words, using *Montana* as the relevant text rather than an Act of Congress or treaty divestiture) can also be explained by a text rather than the *Montana* precedent. *Brendale v. Yakima* can be explained by allotment again.⁶⁴ *Strate v. A-1 Contractors*'s limitation on tribal adjudicatory jurisdiction over nonmembers can be explained by the federal easement and rights of way statutes.⁶⁵ *El Paso v. Neztosie* can be explained by the Price-Anderson Act.⁶⁶ *Nevada v. Hicks* is explained by the Act of Congress establishing Section 1983.⁶⁷ *Atkinson Trading v. Shirley* can be explained by the Act of Congress establishing the trading post.⁶⁸ *Plains Commerce Bank v. Long Family Land and Cattle Co.* can be explained by allotment acts (again).⁶⁹

The next divestiture case after *Montana*, *Duro v. Reina*⁷⁰ decided in 1990, extended the *Oliphant* holding to all nonmembers including the class of persons known as nonmember Indians. The majority there identified no text whatsoever to apply, and interestingly drew little from the *Oliphant* reasoning. *Oliphant*'s history was largely racialized, meaning that the texts compared and contrasted Indians and non-Indians. The *Duro* Court, which involved carving out some Indians from that dichotomy, could not rely on much of that reasoning. Instead, the Court drew from likely irrelevant and extra-textual notions such as the theory of the consent of the governed and modern international law critiques of statehood such as the "democratic deficit."⁷¹

The most recent tribal powers case, *Dollar General v. Mississippi Band of Choctaw Indians*,⁷² resulted in a 4-4 tie with no opinion issued. The case was an unusual entry in the Supreme Court's ledger in that it arose on tribal lands where the general rule is that tribes *do* possess civil jurisdiction over nonmembers.⁷³ The nonmember business agreed in writing to com-

63. Crow Allotment Act of 1920, 41 Stat. 751.

64. 492 U.S. 408 (1989).

65. 520 U.S. 438 (1997).

66. 526 U.S. 473 (1999).

67. 533 U.S. 353 (2001).

68. 532 U.S. 645 (2001).

69. 554 U.S. 316 (2008).

70. 495 U.S. 676 (1990).

71. T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 115 (2002).

72. 136 S. Ct. 2159 (2016).

73. *E.g.*, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (power to issue hunting and fishing licenses); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982)

ply with tribal laws. In addition, there was no text that could be construed as divesting the tribe of authority over the nonmember. Even so, at least a few Supreme Court judges speculated that the text of the Constitution divested tribes of authority over nonmembers.⁷⁴ That text? The statement in the Constitution that “[t]he judicial power of the United States[] shall be vested in one Supreme Court. . . .”⁷⁵ For these judges, any other judicial power within the United States (read: tribal judicial power) that was not beholden to the Supreme Court (again, read: tribal judicial power) was inherently invalid. Perhaps we should consider the Constitution’s Article III text as an existential threat to tribal judicial power. Even so, some Justices’ effort to locate a limitation on tribal powers in the Constitution is a departure from cases like *Duro v. Reina*.

In *all* of the Court’s tribal powers cases in which the Court finds tribal powers limited, there is a text that speaks to the scope of tribal powers, at least impliedly. In few of these cases does the Court treat that text as dispositive. In some cases, like *Oliphant* and *Hicks*, the Court focuses on extratextual matters *at length*. Justice Scalia’s opinion in *Hicks*, in which Section 1983 was the relevant text, does not engage with *that* text directly until the third to last paragraph of Part V of the opinion, and then only in response to Justice O’Connor.⁷⁶

C. Unresolved Area: Federal Statutes of General Applicability

Whether a federal statute of general applicability that is silent as to Indian tribes applies to tribes is a notoriously open and contested question. The primary texts, federal statutes of general applicability, are silent as to tribal interests. These texts run up against a general rule adopted by the Supreme Court (but, as I have shown, intermittently applied) that Congress may impose limitations on tribal sovereignty if it makes a clear expression of its intent to do so.

Consider the Sixth Circuit’s recent cases involving two Michigan tribes and the National Labor Relations Board, *NLRB v. Little River Band*

(power to tax); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980) (same).

74. Transcript of Oral Argument at 45, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496) (suggesting the Constitution is a restriction on Indian tribes even if the text of the Constitution does not so provide: “The Constitution runs to the people. The people have a right to insist on the Constitution even if Mississippi or the Federal government doesn’t care”) (Justice Kennedy).

75. U.S. CONST. art III, § 1.

76. *Nevada v. Hicks*, 533 U.S. 353, 370-74 (2001).

of *Ottawa Indians Tribal Government*⁷⁷ and *Soaring Eagle Casino and Resort*.⁷⁸ In *Little River*, a split panel held that the National Labor Relations Act applied to tribes as regular, non-governmental employers under the statute. The majority, consisting of one regular active circuit judge and one senior circuit judge, held that the Act constituted an implicit divestiture by Congress of the power of tribes to regulate labor relations with nonmembers.⁷⁹ In *Soaring Eagle*, another split decision, the majority went to great lengths to disagree with the *Little River* majority, only to hold that the first panel's holding controlled the outcome in *Soaring Eagle*, too.⁸⁰ Of the five active circuit judges, somehow four of them would have held that the Act was inapplicable to Indian tribes, but the tribes lost both cases.

The analytical structures of the D.C. Circuit and the Ninth Circuit differ from each other and that of the *Little River* majority, but these circuits have all reached the same outcome.⁸¹ The Tenth Circuit is the only circuit to apply the clear expression analysis.⁸² Other circuits tend to follow the Ninth Circuit's reasoning.⁸³

The *Little River* majority's reasoning is arguably consistent with how the Supreme Court deals with tribal powers over nonmembers but deviates from how the Supreme Court deals with tribal powers over tribal members. The *Little River* majority effectively treated the casino employees who were tribal members as nonmembers. Most of the tribe's employees were (are) tribal members. To say that the National Labor Relations Act strips tribes of powers to regulate labor relations of tribal members cannot be right. On the nonmember front, recall that the statutes the Court relied upon (or could have relied upon) were all Indian affairs laws, often tribe-specific. To say that the Act could be construed to impliedly divest tribes of powers over nonmembers would be the first time a statute that is not focused on an aspect of Indian affairs strips tribes of power.

77. *NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537 (6th Cir. 2015).

78. *Soaring Eagle Casino & Resort v. NLRB*, 791 F.3d 648 (6th Cir. 2015).

79. *Little River*, 788 F.3d at 551-55.

80. *Soaring Eagle*, 791 F.3d at 662.

81. *San Manual Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1318 (D.C. Cir. 2007); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116-17 (9th Cir. 1985).

82. *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1195 (10th Cir. 2002) (en banc).

83. See, e.g., *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 179 (2d Cir. 1996); *Menominee Tribal Enters. v. Solis*, 601 F.3d 669, 670 (7th Cir. 2010); *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1129-30 (11th Cir. 1999). But see *EEOC v. Fond du Lac Heavy Equip. & Const. Co.*, 986 F.2d 246, 249 (8th Cir. 1993).

In sum, these cases expose the judiciary as undisciplined interpreters of texts. Consistent with Scalia's harsh criticism of judges, it is plausible that each of these courts was outcome-oriented, choosing an outcome and then casting about for the most plausible theory to support the outcome. Also consistent with Scalia's criticism, there seems to be no generalized theory of interpretation that parties and stakeholders can rely upon to predict outcomes in other cases. Finally, the Indian and tribes' voices are virtually non-existent in these cases. Why?

III. INDIAN LAW AND SUPREME COURT'S PROCESS

Indian law is different. Indian tribes (and Indians) are the only sovereigns and persons explicitly mentioned in the Constitution identified by race and ancestry (excepting the "three-fifths of all other persons" euphemism). Despite being identified in the Constitution, Indian tribes are not governed by the Constitution and the Constitution does not confer citizenship upon Indians (specifically, "Indians not taxed"). The wealth and power of the United States derived from slavery and the vast resources stripped from Indians and tribes. These and other factors create complex structural, institutional, and cognitive biases the judges bring to their work in federal Indian law. These biases stretch and twist federal Indian law jurisprudence in unusual and strange ways.

A. *Structural Biases*

The Constitution simply does not govern or regulate tribal powers. The Constitution primarily deals with states and the federal government. Indian tribes and foreign nations are tangential to the main business of the Constitution. When a state or federal interest conflicts with a tribal or foreign interest, the judiciary almost always favors the interests announced and governed in the Constitution (state and federal interests) rather than those of other governments (tribes and foreign nations). This bias directly affects tribal conflicts with states and the federal government. Tribal interests generally do not prevail in preemption disputes with state governments unless the United States weighs in with a strong federal interest. Reliance upon a relevant and dispositive text is the primary means for tribal interests to prevail here. Treaty rights cases tend to favor tribal interests as a result.

The Constitution also vests Indian affairs powers with Congress, creating an additional structural bias favoring the federal government over state governments. But the delegation of Indian affairs powers is, for some, incomplete. The Constitution specifically granted Congress powers to regulate commerce with Indian tribes. Congress used that power in

1790 to preempt the field of Indian affairs. The Constitution also established the Treaty Power, which the United States had already been using to govern relations with Indian tribes. The United States continued invoking the Treaty Power with tribes until 1871. Indian law primarily is federal. Because federal power in Indian affairs is plenary, the judiciary is extremely unlikely to strike down federal statutes for lack of federal power, whether tribal or individual Indian interests favor the laws or not. The judiciary has affirmed the authority of the federal government to impose incredibly disruptive programs on Indian and tribal interests, such as federalizing Indian country criminal jurisdiction and privatizing Indian reservations. The judiciary also has confirmed the power of the federal government to establish and maintain an enormous bureaucracy dedicated to administering Indian affairs in cooperation with tribal governments.

The Constitution acknowledges states, foreign nations, and Indian tribes as sovereign entities. The Constitution provides for how state sovereign powers are to be regulated but says little on foreign nations and Indian tribes. The close grouping of foreign nations and Indian tribes, the federal primacy in Indian affairs, and the extensive use of the Treaty Power and War Powers in dealing with Indian tribes all helped to establish a special relationship between the federal government and Indian tribes analogous to the relationship of the federal government to foreign nations. The Supreme Court historically assumed that the special relationship was therefore akin to foreign affairs matters left exclusively to the other branches of the federal government under the political question doctrine. The judiciary's deference to the federal government further supports federal legislative programs in Indian affairs, both for the benefit and detriment of Indian and tribal interests.

The acknowledgement of Indian tribes and individual Indians in the text of the Constitution (as well as the euphemism referencing the slavery of African Americans and others) initially created a bias in favor of race-based classifications in law. The Reconstruction Amendments presumably reversed that bias, but Indian tribes and individual Indians remain in the Constitution's text. The colorblindness/antidiscrimination policies of the post-Reconstruction Amendments Constitution should be inapplicable to Indian affairs statutes creating what otherwise would be considered racial classifications so long as they fulfill the purposes of the federal-tribal trust relationship,⁸⁴ but the judiciary remains conflicted about this area. The Constitution's text begs the question of which entities are "Indian tribes" and which persons are "Indians," with the judiciary historically deferring to Congress and the executive branch on those questions.⁸⁵ However, in

84. *Morton v. Mancari*, 417 U.S. 535, 553-55 (1978).

85. Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495 (2020).

recent decades this deference is grudging and skeptical given the color-blindness/antidiscrimination principles embedded in the modern Constitution.

Because Indian law is so federalized, Indian affairs legislation is beholden to Congressional political processes. The federal legislative process is a lumbering behemoth, slow to act, slow to respond, and inclusive of political interests on all sides, even those completely irrelevant to Indian affairs. There could be far more statutes to deal with gaps in federal Indian law, but there are not, leaving the judiciary to fill those gaps.

Finally, because Indian law is federalized, Constitutionalized, and riddled with disputes and conflicts, the Supreme Court accepts a disproportionately high share of Indian affairs cases for review. Because there are many gaps in the law and confusion in the lower courts, the Court is frequently tempted to behave as a common law court. And when the Court makes policy, the difficulty of the federal legislature to respond (even when it disapproves of the judiciary's policy choices) reinforces the Court's actions. It is all too easy for the Supreme Court to make a policy choice and then mention that Congress can alter the landscape of the law if it so chooses. The failure of Congress to act allows the Court to later assume that the judiciary got it right.

These structural biases all but guarantee that the Indian and tribal understanding of federal Indian affairs statutes will never be part of the interpretation of those statutes. Justice Kennedy's repeated assertion that Indian tribes are extra-constitutional preserved for decades the perceptions that Indians and tribes were outsiders to the American political and legal processes, and that their views are irrelevant.

B. *Institutional Competencies (and Biases)*

The Supreme Court's roles include resolving important federal matters of law and resolving conflicts in law in the lower courts. These roles are articulated in the Court's Rule 10, which provides the standards for certiorari decisions. Indian law usually is not considered an "important area of federal law," unlike say, affirmative action, abortion, freedom of religion, gerrymandering, and the like, so that aspect of the Court's role is limited. However, in this category likely belongs federal statutes that have been struck down by lower courts. In Indian law, this is truly a rare circumstance. Still, like any federal statute struck down, a decision striking down an Indian affairs law will be reviewed by the Court. Additionally, perhaps because of the structural biases described above (and likely because of the cognitive biases described below), tribal assertions of power over nonmembers attract the Court's attention. Finally, because Indians and tribes are always suing the United States over breaches of the government's trust duties to Indian and tribal interests (and occasionally

win), the Court tends to think of successful money damages awards against the government as implicating an important federal interest sufficient to justify review.

Splits in lower court authority are relatively rare. The vast majority of federal court decisions in Indian affairs are made by the Ninth, Tenth, and Eighth Circuits (in decreasing numerical order). Splits in authority involving federal or state criminal jurisdiction do happen amongst federal and state courts, though not often, but these splits in authority tend to force the Court's hand by implicating both splits in authority and (relatively) important federal interests. As a result, reservation boundary matters that are reservation-specific (or "factbound," in the Court's parlance) tend to attract the attention of the Court even without a split in authority.

The Court plays a role in policing the separation of powers between the federal branches and in moderating federalism disputes between the federal and state governments. Disputes between states and Indian tribes in which the state loses below tend to be reviewed at a higher rate by the Court, likely influenced by the structural biases described in the previous subpart. State disputes with the federal government over Indian affairs decisions are the same.

The Supreme Court also polices the lower federal courts by enforcing the limited jurisdiction of the federal judiciary. Sovereign immunity cases—federal, state, and tribal—are seemingly ever-present on the Court's docket, as are Article III standing cases. Perhaps because of the structural biases described above, plaintiffs opposing tribal interests almost always have standing, but tribal interests do not.⁸⁶

The institutional tools of the Supreme Court are many, but also limited in scope. Many Indian affairs cases decided by the Supreme Court involve constitutional and statutory interpretation cases, or texts. This is in the heartland of the Supreme Court's work. Many Indian affairs cases require the Court to delve into the archives for historical resources and make judgments about them, also part of the Court's competency.

As an institution with limited powers whose influence depends entirely on persuasion and the legitimacy of the institution, the Supreme Court cannot be a policy court. But it is, and it always has been. Advocates know this, which is why the Court is peppered with numerous amicus briefs, sometimes dozens, sometimes *hundreds*, in every single case

86. Compare *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 227-28 (2012) (holding non-Indian neighbors to Indian lands have standing to challenge federal agency actions involving those lands), with *Inyo County, Calif., v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony*, 538 U.S. 701, 712 (2003) (holding Indian tribe is not a "person" under Section 1983 with standing to sue state governments for violations of federal law).

it reviews. Many of these amicus briefs are straight-up legal arguments (often repetitive of the merits briefs of the parties), but the more influential briefs bring to the Court's attention other types of information relevant to the Court's decision. These often are straight-up policy briefs, not much different than the reports and testimony that advocates submit to Congress or the executive branch. The Court has not acknowledged or dealt with this issue in a meaningful or transparent way, but the Court has no institutional capacity to interrogate the claims made in these policy briefs.

Lower courts can hold trials where evidence and witnesses are interrogated and examined, but not the Supreme Court. It is here where the Court is at its weakest institutionally, but the Court allows observers to assume that this is where the Court is strongest. These policy briefs can have outsized influence on the Court by treading a careful line of making aggressive assertions of fact and policy and making illegitimate and outlandish representations. The Court's proxy for determining the validity of an amicus's claims is the author of the brief or the institution filing the brief. This method is fraught with potential error and riddled with the potential for abuse by zealous and passionate advocates.

This is especially so in Indian affairs cases. Indian affairs matters are not matters of general knowledge, they are often reservation-specific, and prone to confabulation by advocates. The Court's institutional capacity to govern and moderate the amicus is perilously and dangerously (for tribal interests, mostly) inadequate. Repeatedly the Court has been told by tribal and Indian interests—and their opponents—that a decision in an Indian affairs case will lead to monumental policy consequences, only for those consequences to be illusory. Perhaps the worst example of this phenomenon, although far from the only one, is *City of Sherrill v. Oneida Indian Nation*,⁸⁷ where the Court adopted a legal theory it had previously and expressly rejected in earlier cases that had been proposed by a fringe amicus that no party briefed at any stage of litigation. This theory demanded extensive fact-finding by a trier of fact, and the Court applied that theory to the case at hand without any briefing or opportunity for the tribe to litigate the merits of that theory or establish facts relevant to that theory.

C. Cognitive Biases

The Supreme Court's Indian affairs precedents are riddled with biased statements about Indians and tribes, statements that occasionally governed the outcome of cases. The Court in *Tee-Hit-Ton Indians v. United*

87. 544 U.S. 197 (2005).

States,⁸⁸ decided a year after *Brown v. Board* by the same group of judges, referred to what “every American schoolboy knows”: that Indian treaties were shams perpetrated by Americans on uncivilized and ignorant Indian people. The Court in *Ex parte Crow Dog*⁸⁹ excused Crow Dog from federal criminal prosecution in part because as an ignorant savage he would be unfairly treated in federal court by civilized laws and lawyers.⁹⁰ Throughout the Indian law canon, Indian people are referred to as “incompetents,” “wards,” unlettered, people without laws, uncivilized heathens, and so on.⁹¹ Regardless of the language used, the Court’s Indian affairs jurisprudence depends on the presumed inferiority of Indian people.

One would like to think that a modern, more enlightened Supreme Court would no longer characterize Indian people with dour derision and mockery as a matter of course, but the Court’s framing of the “Indian-ness” of the Cherokee father and daughter in *Adoptive Couple v. Baby Girl* proves that hope wrong.⁹²

88. 348 U.S. 272, 290 (1955).

89. 109 U.S. 556 (1883).

90. The Court’s infamous language is worthy of reproduction in the margin:

The nature and circumstances of this case strongly reinforce this rule of interpretation in its present application. It is a case involving the judgment of a court of special and limited jurisdiction, not to be assumed without clear warrant of law. It is a case of life and death. It is a case where, against an express exception in the law itself, that law, by argument and inference only, is sought to be extended over aliens and strangers; over the members of a community, separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others, and not for them, which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries them not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man’s revenge by the maxims of the white man’s morality.

Id. at 571.

91. *E.g.*, *Drummond v. United States*, 324 U.S. 316, 318 (1945) (“incompetent Indian”); *Rice v. Rehner*, 463 U.S. 713, 724 (1983) (“Indian wards”); *United States v. Winans*, 198 U.S. 371, 380–81 (1908) (“unlettered”); *Oregon v. Hitchcock*, 202 U.S. 60, 62 (1906) (“uncivilized”).

92. 570 U.S. 637 (2013).

Perhaps the Court has improved on that front generally, but even now the Court can be expected to assert biased, factually unsupportable claims about Indian tribes. The Court, in majority and in additional opinions, has asserted that Indian tribes are “extra-constitutional,”⁹³ are “quasi-sovereign nations,”⁹⁴ or, in Justice Thomas’ view, are not sovereign at all.⁹⁵ The Court claims that tribal court procedures are “unusually difficult” for nonmember litigants.⁹⁶ The Court asserts that since nonmembers cannot vote, serve on juries, or run for tribal office, they are therefore political outsiders who cannot expect due process or fairness under tribal law from tribal governments. And the Court still rests heavily on the old guardian-ward metaphor that Congress and the executive branch discarded long ago.

For the judiciary, modern tribes are worse than historical tribes. Historical tribes were under the thumb of the federal government. Modern tribes have resources, self-governance powers, and the federal government (usually) backing them up. The judiciary presumes, in some cases as a matter of law, that modern tribes are inherently disruptive to and competitive with state and local governments, and adverse to nonmember individuals, businesses, and other organizations.

Consider *City of Sherrill v. Oneida Indian Nation*,⁹⁷ where the Supreme Court armed non-tribal governments and non-Indians with equitable defenses designed to protect non-tribal interests.⁹⁸ There, a tribe repurchased reservation land illegally alienated from the tribe centuries earlier and asserted an immunity from local taxes on that land.⁹⁹ The Court said too much time had passed, and that the tribe’s immunities were too disruptive to the non-Indian governments and citizens to be allowable.¹⁰⁰ The potential scope of that Court’s reasoning is vast, and truly an existential threat to Indian tribes.

Most fundamentally, the judiciary views Indians and tribes as outsiders—even foreigners—to the American legal and political world. The federal government’s jealous preservation of its dominance in Indian af-

93. *United States v. Lara*, 541 U.S. 193, 213 (2004) (Kennedy, J., concurring in the judgment).

94. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978).

95. *E.g.*, *Lara*, 541 U.S. at 215 (Thomas, J., concurring in the judgment) (referring to tribal sovereignty as a “doubtful assumption”).

96. *Nevada v. Hicks*, 533 U.S. 353, 385 (2001) (Souter, J., concurring).

97. 544 U.S. 197 (2005).

98. *Id.* at 215.

99. *Id.* at 202.

100. *Id.* at 215 n.9 (“The relief OIN seeks—recognition of present and future sovereign authority to remove the land from local taxation—is unavailable because of the long lapse of time, during which New York’s governance remained undisturbed, and the present-day and future disruption such relief would engender.”).

fairs was initially tied to the outsider, foreign status of Indians and tribes. Even now that Indians are U.S. citizens and Indian tribes are ingrained in federal, state, and local government affairs, the judiciary continues to place the outsider status label on Indians and tribes. In the *Murphy* case, for example, despite the fact that the Muscogee (Creek) Nation had done important work and expended vast resources to govern and care for Indian and non-Indian citizens within its reservation, the Court seemed unimpressed and uninterested, apparently worrying more about tax revenue than good governance.¹⁰¹

IV. THEORIZING INDIAN LAW TEXTUALISM

Indians and tribes have no built-in advantages. For Indians and tribes, the history of Indian law is of no comfort, and the numerous biases of the judiciary make every case a presumptive loser. In this environment, those arguing for Indian and tribal interests have no real choice but to rely on a text. Every case depends on framing a matter with the best text possible. But how to know what texts will matter? And how to know when texts will not matter at all?

There are two theories of Indian law textualism, that of Scalia (and pretty much every other textualist) and that of Gorsuch. Scalia's textualism is nihilistic and cynical. Gorsuch's theory, though applied in only one case so far, is perhaps as cynical but *far less* nihilistic.

I have mentioned Scalia's textualism as it applies in Indian affairs cases. In short, while Scalia's followers might chafe at this characterization, Scalian textualism would simply require the judge to locate the universe of reasonable original public meanings of a text, select the meaning(s) the judge believes is the best reasonable meaning (and yes, political or ideological choices are completely acceptable), assert that the selected meaning is the only truly reasonable meaning, and persuade four judges out of the remaining eight to agree. This textualism, which predominates throughout the nation, is subject to the same criticism that Scalia leveled against liberal, "activist" judges.

Scalia was not even adherent to his own brand of textualism, especially in the later stages of his career. In *Michigan v. Bay Mills Indian Community*,¹⁰² for example, he wrote a separate dissent to highlight that his policy views on tribal sovereign immunity had changed, compelling him to switch his vote from an earlier case, *Kiowa Tribe v. Manufacturing*

101. Justice Ginsburg's lone question in the *Murphy* argument involved tax. Transcript of Oral Argument, *supra* note 48, at 35.

102. 572 U.S. 782, 814 (2014) (Scalia, J., dissenting).

Technologies,¹⁰³ even though the legal texts had remained exactly the same. Scalia's individual dissent in *Adoptive Couple v. Baby Girl*,¹⁰⁴ in which he broke from a five-judge majority including four conservatives like himself, also reeks of a policy preference determining his vote—in that case, about father's rights.

Scalian textualism embraces canons of statutory construction, as described both in *A Matter of Interpretation* and in the treatise on textual canons he coauthored with Bryan Garner. Despite the prominence of the canons of construing Indian treaties and Indian affairs statutes and the various examples of the clear statement or expression rules that the Supreme Court has imposed on judges interpreting Indian affairs texts, Scalia and Garner make *no mention whatsoever* of these canons in the treatise. Nor did Scalia apply them in his Indian law decisions.

Justice Gorsuch, in his *Washington State Department of Licensing v. Cougar Den*¹⁰⁵ concurrence, seems to have employed what could be called Indian law originalism. In that case, which involved the interpretation of an Indian treaty,¹⁰⁶ Gorsuch relied exclusively on evidence of the understanding of that treaty by the Indians who negotiated that treaty, and representations made by those on the American side *consistent* with the Indian understanding. Gorsuch casually tossed aside any modern understanding that differed or modified the original understanding, framing the issue as “adopting the interpretation most consistent with the treaty’s original meaning.”¹⁰⁷ Significantly, while dissenters raised the specter of horrific policy consequences flowing from the interpretation of the treaty favored by the majority,¹⁰⁸ Gorsuch was having none of it. Gorsuch’s nascent theory of Indian law originalism took the discipline demanded by aspects of Scalia’s textualism, most notably the separation of text from judicial policy preferences, and applied it simply.¹⁰⁹

It is now clear that *Cougar Den* wasn’t a one-time-only deal with Justice Gorsuch. Any textual theory that prioritizes text over the policy preferences of unelected judges—preferences that likely arise from the

103. 523 U.S. 751 (1998).

104. 570 U.S. 637, 667–68 (2013) (Scalia, J., dissenting).

105. 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring in the judgment).

106. *Id.*

107. *Id.* (citing *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534–35 (1991)).

108. *E.g., id.* at 1026 (Roberts, C.J., dissenting) (“The problem is that today’s ruling for *Cougar Den* preempts the enforcement of any regulation of goods on the highway that does not concern travel safety—such as a prohibition on the possession of potentially contaminated apples taken from a quarantined area (a matter of vital concern in Washington).”).

109. *Id.* at 1021 (Gorsuch, J., concurring in the judgment) (“In the end, then, the only true threat to tribal interests today would come from replacing the meaningful right the Yakamas thought they had reserved with the trivial promise the State suggests.”).

various structural, institutional, and cognitive biases of the judiciary—is an improvement, perhaps even a paradigmatic improvement. That Justice Ginsburg—the author of *City of Sherrill*, an opinion that pointedly discarded the text in favor of policy preferences—joined Gorsuch's *Cougar Den*'s concurrence and his *McGirt* majority opinion is also suggestive that she shares his views on textualism in the Indian law context.

In short, the deeply split *McGirt* decision shows that the Court still has no dominant theory. Textualism is on the minds of the judges, but the discipline to accept the outcomes that textualism brings prevailed by a solitary vote.

A. *The Role of Indians and Tribes in Federal Indian Affairs Legislation*

Indian affairs statutes are all about Indians and Indian tribes. These statutes cover an enormous amount of contested ground, literally and figuratively. They involve subject areas in which the federal government is not typically a player, including areas of law some observers and judges claim are outside the scope of the Constitution. The Supreme Court has held conclusively that any federal statute rationally related to the fulfillment of the federal government's trust responsibility, or duty of protection, is valid.¹¹⁰

It is now normal and expected that Indian tribes will be involved in the crafting of federal legislation. It is fair to say nearly all federal Indian affairs statutes and regulations of the last fifty years originated with requests for action by tribal interests. The Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*,¹¹¹ overruling *National League of Cities v. Usery*,¹¹² which had given teeth the Tenth Amendment, placated states by reminding them that they had a special place in the structure of the American lawmaking apparatus—they could cause the introduction of legislation and influence that legislation. Indian tribes hold a special place in American lawmaking, too, though that role obviously differs from the roles of states. But in Indian affairs legislation, tribal interests should play *at least* as critical a role as those of states. While states and the federal government are important players in Indian law, often they are competitors to the tribes' interests. When it comes to Indian affairs laws of the last half-century, there surely will be tribal statements and actions communicating the tribes' understanding of the meaning of those texts. The judiciary must take those statements in consideration when interpreting those texts. The same holds for older texts, even ones in which

110. *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

111. 469 U.S. 528 (1985).

112. 426 U.S. 833 (1976).

Indian tribes and individual Indians had no say, perhaps most especially for those texts.

B. *Toward a Rule of Interpreting Indian Affairs Texts—Tribes as Partners in the Creation of Indian Law*

The canons of construing Indian treaties provide a model for a general rule for interpreting Indian affairs texts. Already, courts are obligated to interpret ambiguous terms in both treaties and statutes to the benefit of tribal interests. Already, courts are obligated to take historical context into consideration when interpreting treaties. Already, courts are obligated to interpret a treaty's text in light of how the Indians of that time understood the text. Already, courts are obligated to analyze certain Indian affairs laws under a clear statement or clear expression rubric.

The reality is that when it comes to interpreting Indian affairs statutes, the judiciary too often treats these canons as voluntary. And if a court relies on these canons, they often do so in support of an outcome favoring tribal interests reached on other grounds, sort of like frosting on top. And some judges refuse to respect the canons at all. After all, Scalia did not even *acknowledge* any of these canons in his exhaustive treatise on interpretative canons.

The structural, institutional, and cognitive biases permeating the judiciary and the legal system help to explain why the canons are so disrespected. Perhaps the only way to combat the biases is to take Indians' and tribes' understanding of the meanings of these texts into greater consideration. But courts are unlikely to do so unless they acknowledge their biases and take affirmative steps to combat them.

One important first step, and perhaps the biggest step, is to acknowledge as a matter of law that Indian tribes are domestic sovereigns that participate in federal legislative processes, usually initiating and later guiding Congress's Indian affairs enactments. There is a lengthy history of federal-tribal negotiation leading to the creation of federal law. The most direct arms-length federal-tribal lawmaking was Indian treatymaking, which nominally ended in 1869, the year the Senate ratified the last Indian treaty. But treatymaking did not end there. The United States continued to negotiate sovereign-to-sovereign agreements with Indian tribes, at least one of which the Supreme Court interpreted as it effectively was a treaty.¹¹³ Those negotiated agreements—effectively treaties ratified as regular legislation—continued to be ratified by Congress in this way for decades after 1869. Many of them were allotment agreements. At times, it

113. *Winters v. United States*, 207 U.S. 564 (1908) (interpreting 1888 agreement with tribe enacted by Congress as legislation consistent with the Indian treaty canons).

might appear that Congress did act unilaterally, such as when it terminated the tribal courts in Oklahoma in 1898, but even in that instance, there was tribal input and participation in drafting the legislation. Importantly, tribal courts continued operating under limited jurisdiction, a fact later confirmed by a federal court in 1909.¹¹⁴

Even today, Congress continues to enact Indian affairs statutes at tribal request. Indian claims settlements for money damages, land restoration, water rights, and so on are ratified by Congress after arms-length negotiations. The interpretation of these Acts of Congress should absolutely take into consideration the understanding of tribal interests—to do otherwise would be equivalent to allowing one side to a contract to dictate how the contract is to be enforced. Consider the Michigan Indian Land Claims Settlement Act,¹¹⁵ which involved payments by the United States to five Indian tribes, each of which was asked to write a section of the law to explain how each of the tribes would use the money. Congress ratified the law as written by the tribes. Indian tribes are unusual in this way in American law.

Even when Congress passes general Indian affairs statutes that apply to all Indians and tribes, tribal participation in the political process is robust. Consider the negotiation of the Indian Gaming Regulatory Act of 1988,¹¹⁶ in which federal agencies, tribal leaders, and states hammered out a complex legislative scheme that was for all practical purposes a negotiated settlement ratified by Congress. How tribal interests understood that statute is at least as important as how the United States and state governments understood it for purposes of interpreting it.

Interpretation of federal statutes always starts with the text and, if the text is ambiguous, the courts often will eventually look at legislative history. The evidence most favored by the courts includes the statements of the House or Senate committees that passed the bill in the first place. To use that evidence alone in interpreting Indian affairs statutes and ignore the understanding of tribal interests (and other interests, too, such as the states who worked on IGRA) is simply a poor practice. But that is the practice, unfortunately.

Forget voluntary or useful canons, I would *require* the judiciary in every case in which an Indian affairs text is being interpreted to consider how affected Indians and tribes understand the meaning of that text.

114. *Hayes v. Barringer*, 168 F. 221 (8th Cir. 1909), cited in F. Browning Pipestem & G. William Rice, *The Mythology of the Oklahoma Indians: A Survey of the Legal Status of Indian Tribes in Oklahoma*, 6 AM. INDIAN L. REV. 259, 297 (1978).

115. Pub. L. No. 105-143, 111 Stat. 2652, 2658 (1997).

116. Pub. L. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701-2721 (2012)).

Textualism is wholly illegitimate. Indian law is wholly illegitimate without that analysis.

C. *Impacts of Indian Law Textualism on the Cases*

Consider several of the cases advocates for tribal interests cite as the worst Indian law decisions. I will try to show not that the outcomes of these cases would have been changed, but that the reasoning of these cases would have been improved if tribal understanding of the laws at issue were incorporated into the analysis. Legitimacy is not exclusively about outcomes; it is about persuasion. Tribal interests must be persuaded, too, in our system of legal dispute resolution.

1. Reservation Boundaries Cases

Most reservation boundaries cases are resolved by reference to a text that authorizes and implements the allotment of the reservation. While allotment is now widely understood as a terrible policy inflicted on Indian people and tribes by the federal government, it should be understood that allotment was often negotiated between the United States and the tribes (although the federal government usually made clear the tribe would have no choice on the fact of allotment).¹¹⁷ Allotment statutes should be interpreted in light of the understanding of the tribal partners, and not exclusively by considering how the federal government understood allotment.

Requiring courts to take the tribal perspective into consideration would streamline the back-end portions of the *Solem v. Bartlett* structure. Assuming a court engaged in that analysis (recall the Court skipped it in *Nebraska v. Parker*; the *McGirt* majority all but overruled it¹¹⁸), the relevant evidence would be akin to determining how the tribal interests understood the allotment agreement. This analysis is the same as the canon of Indian treaty construction that requires courts to consider how Indians understood the treaty. Allotment agreements are just contracts between sovereigns, after all.

117. See generally *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

118. *McGirt*, 140 S. Ct. at 2468 (“Oklahoma even classifies and categorizes how we should approach the question of disestablishment into three ‘steps.’ It reads *Solem* as requiring us to examine the laws passed by Congress at the first step, contemporary events at the second, and even later events and demographics at the third. On the State’s account, we have so far finished only the first step; two more await. . . . When interpreting Congress’s work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us. . . . That is the only ‘step’ proper for a court of law.”) (citation omitted).

Consider the ongoing suit involving the reservation of the Little Traverse Bay Bands of Odawa Indians.¹¹⁹ The situation in that case resembles the *Murphy/McGirt* matter in that the reservation was never disestablished by Congress, but the tribe was overwhelmed by the entrance of non-Indians into tribal lands. The main difference is that the federal government's implementation of the allotment agreement in the Little Traverse case was catastrophically incompetent and corrupt. The court below did take into consideration some evidence presented by the tribe that tribal members understood the creation of the reservation and allotment to not be mutually exclusive but accepted the invitation of modern residents of the reservation to disclaim that evidence.

Cutting-edge thinking about the creation of Indian reservations is broadening to include the notion that a reservation is a homeland for an Indian tribe. The notion of a tribal homeland is much broader than merely a property interest in an area of land. In early Indian treaty cases before the Supreme Court, the Court accepted the idea of a tribal homeland to find that access to water on- and off-reservation was a right implied in the treaty required to effectuate the purposes of the reservation.¹²⁰ More recently, as climate change and other conditions begin to negatively affect Indian reservations and tribal rights, the courts have agreed that implied treaty rights might include, for example, the right to a healthy environment, healthy enough to protect the purposes of a reservation anyway.¹²¹

It is apparent that the Little Traverse treaty negotiators understood the treaty to create a homeland. That the homeland would be divided up into allotments is barely relevant. Sadly, that the allotted homeland was illegally taken by non-Indians due to the incompetence and corruption of federal officials was somehow not relevant to the district court. All of these things are critical pieces of evidence that the district court chose to ignore or find inconsequential.

2. Tribal Powers Cases

In the modern era—that is after 1959—the consensus of tribal advocates is that *Oliphant v. Suquamish Indian Tribe* is the worst case. Recall the case concluded that no Indian tribe (not just Suquamish) possessed

119. *Little Traverse Bay Bands of Odawa Indians v. Whitmer*, 398 F. Supp. 3d 201 (W.D. Mich. 2019), *appeal filed*, No. 19-2070 (6th Cir.).

120. *United States v. Winans*, 198 U.S. 371 (1905); *Arizona v. California*, 373 U.S. 546 (1963).

121. See e.g., *In re CSRBA Case No. 49576 Subcase No. 91-7755*, 448 P.3d 322, 349 (Idaho 2019) (describing the various purposes of an Indian reservation).

criminal jurisdiction over non-Indians.¹²² We will address on a national scale, as the Court largely did, how Indians and tribes understood the meaning of the texts at play. We begin with the text the Court used in 1985 to explain, at least in part, how Congress divested tribes of the power to prosecute non-Indians, the 1790 Trade and Intercourse Act. We can reasonably assume (although I do not know for sure) that no Indian person or tribal representative lobbied for or against this Act. However, tribes were present in the national political scene, most obviously in negotiating Indian treaties. Historians observe that Congress enacted the Act in order to both implement existing Indian treaties and to guide future treaty negotiations.

In the years immediately preceding and for a few decades following 1790, there were many treaties addressing tribal criminal jurisdiction over non-Indians.¹²³ Some allowed for it, some did not, some others were silent. These treaties are relatively well known in legal circles because they are discussed in Indian affairs cases and in the legal scholarship. Whether tribes actually prosecuted non-Indians is less well known in those circles because *no American court ever asked*. We know, for example, that Oklahoma tribes did exercise criminal jurisdiction over non-Indians, in some cases sentencing non-Indians to death by hanging for murder.¹²⁴ Knowing these facts would be useful and frankly *discoverable* evidence if the judicial system took seriously the views of tribal interests.

I am aware of another time when tribal interests articulated their understandings of the scope of their criminal jurisdiction. I am aware of it only because the *Oliphant* Court mentioned a 1960 Act making it a federal crime for non-Indians to trespass and poach game in Indian country. In 1958, a few tribes asked the Senate to introduce and enact that bill. At a hearing discussing the bill, Senators asked the tribes' counsel why they needed the bill, assuming that the tribes could prosecute the non-Indians themselves. No, the tribes' counsel argued, of course the tribes cannot prosecute non-Indians. The federal government's representatives concurred. The Senators were surprised and asked for authority on that

122. 435 U.S. 191, 212 (1978).

123. Fletcher, *supra* note 60, at 2 n.10 (collecting treaties).

124. See *Talton v. Mayes*, 163 U.S. 376 (1896); see also *Cherokee Murderers*, ST. LOUIS GLOBE-DEMOCRAT, May 7, 1893 (describing the Cherokee Nation's convictions of Bob Talton, a white man adopted by the tribe, and Jason Williams, a nonmember white man, and plans to execute the men for murder); *Cherokee Executions Postponed*, TYRONE DAILY HERALD (Pa.), Aug. 21, 1893 (describing the stay on the execution of Talton, who was a white man adopted into the tribe); *Hanged an Indian*, ST. LOUIS POST-DISPATCH, Aug. 1, 1896, at 5 (describing the hanging of Talton).

proposition. I don't know what happened in response to the request, but Congress passed the bill into law in 1960.¹²⁵

Further, as the Court acknowledged (for a different purpose), Indian tribes *did* prosecute non-Indians in the years leading up to the *Oliphant* case. Congress even acknowledged this practice in the legislative history of the Indian Civil Rights Act of 1968,¹²⁶ and perhaps impliedly affirmed tribal powers in the text of that Act. The Court gave little weight to the practice of tribes, and instead seemed to point out that the relatively pervasive tribal practice of prosecuting non-Indians actually was justification for the Court to consider the issue an important one worthy of review.

The Court provides an unusually rich and deep, if confused, survey of the history of Indian country criminal jurisdiction in *Oliphant*. Within that survey, these texts I mention here are merely two places where tribal interests spoke on their jurisdiction over non-Indians. Even so, the Court completely ignored their views. There are likely others, most notably the long and rich history of the Five Civilized Tribes. Would they have altered the outcome? Maybe, maybe not, but the act of considering tribal and Indian voices surely lends legitimacy to the interpretation of the text.

3. Federal Statutes of General Applicability

What about federal statutes of general applicability,¹²⁷ particularly the National Labor Relations Act (NLRA)? Indian law scholars have examined thoroughly the legislative history of the NLRA, looking for evidence about whether Congress was thinking about Indian tribes in 1935.¹²⁸ There is no more there than there is in the text itself. No one has examined whether Indians and tribes, which were also in the public eye during the 1930s, were involved in the labor disputes of the time. Surely Indian people were involved in labor disputes.¹²⁹

125. Pub. L. 86-634, § 2, 74 Stat. 469 (1960) (codified as amended at 18 U.S.C. § 1165 (2012)).

126. Pub. L. 90-284, tit. II, § 201, 82 Stat. 77 (1968) (codified at 25 U.S.C. §§ 1301-1303 (2012)).

127. One could argue that a statute of general applicability is not an Indian affairs statute, almost by definition. However, once the government and the courts purport to apply those texts to tribal governments, they become Indian affairs statutes.

128. See, e.g., Riley Plumer, *Overriding Tribal Sovereignty by Applying the National Labor Relations Act to Indian Tribes in Soaring Eagle and Resort v. NLRB*, 35 LAW & INEQUALITY 131 (2017); Bryan H. Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of Construction*, 86 OR. L. REV. 413 (2007).

129. See e.g., *Indians Voice Labor Demand: Association Seeks Preference for Tribesmen in Seneca School Work*, MIAMI DAILY NEWS (Okla.), Dec. 29, 1935, at 1, 2; see also Letter to the Editor, *Scores Indian Labor: Alpine Supervisor Says Aborigines Are Not to Be Trusted for Continuous Effort*, SAC. BEE, May 26, 1922, at 24.

The 1934 Indian Reorganization Act¹³⁰ revolutionized tribal governments. For the first time, Congress asked tribal governments to opt into a new form of governance. Most tribes did, and hundreds of tribes deliberated extensively over whether to accept Congress's offer. About two-thirds of tribes that voted agreed to opt in to the 1934 Act.¹³¹ There is a deep historical record of tribal government activity in the 1930s,¹³² but the scholarly record of which I am aware is devoid of tribal views on labor relations. Some of the tribal discussions explicitly mention the jobs that would be created on reservations if tribal governments took over primary governance authority.¹³³ Other discussions noted that there would be more jobs than qualified Indians, requiring tribes to hire non-members.¹³⁴

That Indian people and tribes were thinking about labor in 1934 in the same time frame that Congress was considering a federal labor relations law is relevant evidence about whether tribal interests would have understood the NLRA to apply to Indians and tribes. Textualism's gaze would ignore those views, but it's a start.

CONCLUSION

In 1937, after the enactment of the Oklahoma Indian Welfare Act,¹³⁵ Oklahoma Indian tribes were able to reorganize in a matter akin to how other tribes had done under the 1934 Indian Reorganization Act. Two tribal towns in Oklahoma petitioned to reorganize, seeking recognition as federally recognized tribes. Tribal town organizations were known as *Talva*, loosely translated as "town."¹³⁶ Prior to the Civil War, the *Talva* were the focus of tribal governmental power and resisted the centralization of tribal government, which was what the United States preferred. After the Civil War, the United States succeeded in forcing tribal governmental power to be focused in a national government, what

130. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101-5129 (2012)).

131. Kenneth R. Philp, *Termination: A Legacy of the Indian New Deal*, 14 WESTERN HIST. Q. 165, 170 (1983).

132. The records of the tribal meetings to debate whether to accept the provisions of the 1934 Act are collected in *THE INDIAN REORGANIZATION ACT: CONGRESSES AND BILLS* (Vine Deloria, Jr. ed., 2002).

133. *Id.* at 117 (Oregon Indians); *id.* at 137 (same).

134. *Id.* at 159 (Navajo).

135. Act of June 26, 1936, ch. 831, 49 Stat. 1967 (codified at 25 U.S.C. §§ 5201-5210 (2012)).

136. Memorandum from Frederic L. Kirgis, Acting Solicitor, Dep't of the Interior, to Comm'r of Indian Affairs 2 (July 15, 1937).

we now call the Muscogee (Creek) Nation. The tribal towns lost power on paper but continued to govern as they always had. After the establishment of the national tribal government, the tribal towns still controlled elections, annuity payments, and tribal citizenship. Even after allotment, the towns' political activities continued apace and uninterrupted. Ultimately, the United States acknowledged the tribal towns as separate tribes.

In the *McGirt* and *Murphy* cases, Oklahoma and the United States argued that Congress had effectively terminated the Muscogee (Creek) Reservation, in part, because the tribe had been divested of governmental powers over large portions of the land by virtue of allotment, and in 1898 when Congress terminated tribal courts. But for the tribal towns, nothing changed. They continued to govern as if nothing happened, which means tribal governance remained—perhaps underground—but real and unfortunately, beyond the narrow gaze of the textualist judge.

The text matters. But what texts matter most is dependent on what draws the interpreter's gaze. Throughout the history of federal Indian law, the text is almost always written by non-Indian, privileged white men, and secondarily by other privileged persons. Even Indian treaties negotiated at arm's length were not "written" by Indian people. Federal judicial opinions are not written by Indian people, either. But these texts govern Indian people and Indian tribes and they have engaged with those texts from the initial execution of those texts. Indian and tribal understandings of the meanings of these texts is indispensable in the interpretation of these texts. So far, the judiciary does not privilege those interpretations.

Tribal advocates view the Supreme Court with intense skepticism and cynicism. Few tribal advocates believe the Court as an institution or as a grouping of judges respects tribal interests and claim the Court does not know enough about how its decisions affect Indian country when it makes Indian law. In contrast, tribal interests are always involved in legislative and regulatory activities. As Kirsten Carlson shows, there is evidence that tribes out-perform their expected or perceived status in Congress.¹³⁷ But not so at the Supreme Court.

A large part of the answer is very simple—the textualist gaze ignores or downplays (if not outright disrespects) tribal and individual Indian understandings of the meanings of texts. Serious and honest engagement with *all* of the stakeholders' interpretations of texts is a minimum baseline for legitimate judicial decision-making.

137. E.g., Kirsten Matoy Carlson, *Congress and Indians*, 86 U. COLO. L. REV. 77 (2015); Kirsten Matoy Carlson, *Lobbying Against the Odds*, 56 HARV. J. ON LEGIS. 23 (2019).

Justice Gorsuch and Chief Justice Roberts drew lines in the sand in *McGirt*. Where will the Court go from here?